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No. 90-1049

In the Supreme Court of the United States

OCTOBER TERM, 1990

JOHN H. BAKER, ET AL., PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly rejected petitioners' challenge to the Federal Aviation Administration's denial of their request for an exemption from an FAA regulation (14 C.F.R. 121.383) prohibiting persons over the age of sixty from piloting large commercial airliners.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 917 F.2d 318. Pet App. 1a-19a. The order of the Administrator of the Federal Aviation Administration (FAA) is unreported. Pet. App. 21a-83a.

JURISDICTION

The order of the Court of Appeals for the Seventh Circuit affirming the FAA's decision was entered on October 31, 1990. The petition for a writ of certiorari was filed on January 2, 1991. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. In 1959, pursuant to its statutory authority to promote safety in air commerce, the Federal Aviation Administration (FAA) promulgated a regulation (now codified at 14 C.F.R. 121.383(c)) prohibiting individuals over the age of sixty from piloting commercial airline jets seating more than thirty passengers. The FAA explained that the "age sixty" rule is based upon: 1) studies indicating that sudden incapacity and other risks due to medical impairments become significantly more frequent when a person reaches the age sixty; and 2) the fact that the possibility of such incapacity and other problems occurring cannot be accurately predicted as to any specific individual. See Pet. App. 28a-29a; 24 Fed. Reg. 9767 (1959). See also 49 Fed. Reg. 14,695 (1984).

The Federal Aviation Act of 1958 provides that the FAA "may grant" exemptions to its general rules if it "finds that such action would be in the public interest." 49 U.S.C. 1421(c). Although over the years a number of individuals have sought exemptions from the "age sixty" rule, none has ever been granted. See Pet. App. 2a.

2. In 1986, petitioners filed for exemptions from the FAA's age sixty rule. Specifically, petitioners argued that a battery of tests devised by an expert panel (assembled by petitioners) could be used as a basic protocol for assessing the fitness of pilots over the age of sixty. See *Aman* v. *FAA*, 856 F.2d 946, 949 (7th Cir. 1988). Petitioners claimed that: 1) pilots over sixty who passed the battery of tests were no more likely to cause an accident due to sudden incapacitation or undetected deterioration than a pilot under age sixty; and 2) older pilots who passed the tests were actually safer than their younger counterparts when their respective experience was taken into account. *Id.* at 952. See also Pet. App. 2a. The FAA denied the petition for exemption and petitioners sought review (under 49 U.S.C. 1486(a)).

3. The Seventh Circuit upheld the FAA's ruling in part. The court held that the FAA "adduced substantial evidence supporting its rejection of the contention that the petitioners' protocol, combined with existing methods of operational testing, would screen out all increased risks of incapacitation or undetected skill deterioration among pilots older than 60." *Aman* v. *FAA*, 856 F.2d at 957; see also *id.* at 954. The court, however, held that "the FAA failed to set forth a sufficient factual or legal basis for its rejection of the petitioners' claim that older pilots' edge in experience offsets any undetected physical losses." *Id.* at 957. The court remanded the case to the agency to provide findings and explanations with regard to that claim. *Ibid.*; see also Pet. App. 2a. Further, the court ordered the FAA to explain why the agency had a more flexible exemption policy for pilots under the age of sixty with heart disease or alcoholism problems. 856 F.2d at 957; Pet. App. 7a.

4. To implement the Seventh Circuit's directive, the FAA opened a 30-day comment period to receive comments on the issue of "age versus experience." Pet. App. 24a. Approximately 178 comments were received. In addition, petitioners filed three additional supplements to explain why they should be granted exemptions. *Ibid.*

After reviewing the comments and the additional information provided by the petitioners, the Administrator issued an order denying the exemptions and explaining the reasons for the denials. Pet. App. 21a-83a. The order analyzed the comments and additional evidence, and concluded that there was not sufficient proof that the experience of a pilot offsets the "danger of deterioration" associated with the aging process. *Id.* at 8a, 24a-66a. The Administrator found the comments and studies relied upon by petitioners to be faulty and inconclusive. See, *e.g.*, *id.* at 40a-46a, 50a-58a, 66a. The Administrator also concluded that the anecdotal evidence submitted by petitioners (regarding heroic acts per-

formed by pilots approaching or over the age of sixty) did not evidence a pattern from which any valid assumptions could be made, and did not demonstrate that experience offsets the dangers associated with sudden incapacitation and undetected deterioration. *Id.* at 46a-50a.

Further, the Administrator explained that the agency's policy regarding exemptions to the age sixty rule was not inconsistent with the agency's approach to special issuances for pilots under the age of sixty with an identifiable medical condition:

> For the person with known disease, the prognosis of the disease can be assessed and specific tests or evaluations identified to monitor the condition.* * * Where [a special issuance] is granted, the condition in question has been clearly identified, and the agency has been able to develop a means of assessment and surveillance specifically designed to demonstrate the individual's capabilities and to identify any adverse changes. * * * Such is not the case in aging, since there are no generally applicable medical tests that can, at this time, adequately determine which individual pilots are subject to incapacitation * * *.

Pet. App. 68a-69a.

Pursuant to 14 C.F.R. 11.25, the FAA held that the petitioners failed to provide reasons why the granting of such exemptions would not adversely affect safety or would otherwise provide a level of safety equal to that provided by strict adherence to the age sixty rule. Pet. App. 69a.

5. Petitioners again sought review of the FAA's order in the Seventh Circuit. The court of appeals affirmed the FAA's order. The court agreed with the Administrator that petitioners' studies and analysis did not present "a persuasive statistical record." Pet. App. 4a. The court held that petitioners' anecdotal evidence was not especially relevant given

the fact that none of the pilots before the court were ones who performed the "aeronautical miracles." *Id.* at 3a-4a. The court recognized it was petitioners' burden to show that they deserved an exemption, and concluded that petitioners failed to carry their burden of establishing that the Administrator acted improperly in concluding that the public interest in safety would not be served by granting the exemptions sought. *Id.* at 3a, 8a-9a. The court stated, "we cannot justify a conclusion that, on average, experience sufficiently offsets possible age-related impairment of health or skills to clearly guarantee a net constancy or increase in safety." *Id.* at 2a.

Further, the court rejected petitioners' challenge to the agency's rationale for issuing exemptions to younger pilots with specific medical problems that can be safely monitored, while not issuing exemptions to pilots over sixty. The court found that petitioners had not demonstrated that the agency's distinction was invalid "either theoretically or practically." Pet. App. 7a.[1]

ARGUMENT

The FAA's "age sixty" rule, prohibiting persons over the age of sixty from piloting large commercial passenger jets, has been upheld by every court that has addressed its validity. Moreover, every court that has examined the FAA's strict approach to exemptions from the age sixty rule has upheld the agency's exemption policy, as well as the specific exemption denials. Here, the court of appeals correctly upheld

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[1] Judge Will dissented. Pet. App. 9a-19a. The dissent argued that the FAA must further justify its finding that pilots over sixty "are significantly more prone to medical catastrophe than other pilots." *Id.* at 14a. Further, the dissent argued that the FAA policy of refusing to grant any exemptions to the age sixty rule was not warranted by the evidence or by common sense. *Id.* at 17a.

the FAA's decision in ruling that petitioners had failed to demonstrate adequately that granting them exemptions from the age sixty rule would benefit public safety. The present case was correctly decided and does not conflict with the decision of any other court of appeals, or of this Court. Accordingly, further review by this Court is not warranted.

1. The FAA adopted the "age sixty" rule in 1959 based upon concerns about the danger posed to the public when a pilot of a large commercial jet is suddenly physically incapacitated. After extensive study, the Administrator found that "sudden incapacitation due to heart attacks or strokes become more frequent as men approach age sixty and present medical knowledge is such that it is impossible to predict with accuracy those individuals most likely to suffer attacks." *Air Line Pilots Ass'n Int'l* v. *Quesada*, 276 F.2d 892, 898 (2d Cir. 1960), cert. denied, 366 U.S. 962 (1961). Because of the high risks at stake (which are elevated by the fact that older pilots with established seniority tend to fly the largest and fastest airplanes), the Administrator barred any person from piloting large commercial jets after reaching his sixtieth birthday. *Ibid.*; 24 Fed. Reg. 9767-9768 (1959). See, also *Rombough* v. *FAA*, 594 F.2d 893, 897-898 (2d Cir. 1979).[2]

Since adoption of the age sixty rule, numerous parties have challenged the reasonableness of the rule and its factual predicate. However, every court to address the issue has upheld the FAA's regulation. See, *e.g.*, *Starr* v. *FAA*,

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[2] The age sixty rule does not, however, require the pilot to retire. He may still continue to pilot private and commercial jets outside of the coverage of 14 C.F.R. Pt. 121 (see 14 C.F.R. 121.1), and can, if certified, continue to work in the cockpit of large commercial crafts covered by Part 121 in a position other than pilot (*e.g.*, flight engineer or navigator). See *Aman* v. *FAA*, 856 F.2d at 948; 14 C.F.R. 121.385-121.389.

589 F.2d 307, 312-314 (7th Cir. 1978); *O'Donnell* v. *Shaffer*, 491 F.2d 59, 61-62 (9th Cir. 1974); *Air Line Pilots Ass'n Int'l* v. *Quesada*, 276 F.2d at 898. The courts have recognized that although there may be difference of opinion and conflicting evidence, Congress has granted the FAA the statutory responsibility for air passenger safety and that the agency's rule is adequately supported and well within the agency's authority. See *Rombough* v. *FAA*, 594 F.2d at 899-900; *Starr* v. *FAA*, 589 F.2d at 312-313; *Air Line Pilots Ass'n Int'l* v. *Quesada*, 276 F.2d at 898.

Despite the unanimous judicial acceptance of the age sixty rule, the FAA has recognized that the rule is not indelible. The agency has continued to research and examine whether new advances in medical science can identify individual pilots over the age of sixty who do not pose a risk to public safety. See *Starr* v. *FAA*, 589 F.2d at 312 (the FAA has "not shirked its duty" to examine new advances).[3] The courts have recognized the FAA's continuing efforts and have held that the FAA may continue to adhere to the age sixty rule "as long as it continues to consider new advances in medical technology." *Starr* v. *FAA*, 589 F.2d at 314.

2. Petitioners here, like others before them, have sought to circumvent the FAA's age sixty rule by seeking exemptions from the rule under 49 U.S.C. 1421(c), which states the FAA "may grant" exemptions to its general rules if it "finds that such action would be in the public interest." Petitioners' arguments do not seek merely to justify individual exemptions, but rather are frontal attacks on the reasonableness of adhering to the age sixty rule. See Pet. 18-19; *Aman*, 856 F.2d at 949 n.2. The FAA's response to

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[3] For example, the FAA reviewed both a Navy study of the health histories of 1,000 pilots, and a study by the National Institutes of Health (see 49 U.S.C. 1421 note (1982)), and determined to retain the age sixty rule See *Aman* v. *FAA*, 856 F.2d at 948.

petitioners and others seeking exemptions has been that it will not grant the exemption unless the agency determines that there is a medically reliable method of determining the risk of sudden incapacitation and other pertinent risks. See Pet. App. 67a-69a.

Up until the present date, the FAA has not been satisfied that the medical tests or other procedures suggested by interested parties, or independently investigated by the agency, can adequately assess the risks of sudden impairment. And without such a determination, the agency has "simply chosen what it considers the safer" approach – *i.e.*, to continue to adhere to the age sixty rule. See *Starr* v. *FAA*, 589 F.2d at 312. See also Pet. App. 67a-69a; *Aman* v. *FAA*, 856 F.2d at 954; *Keating* v. *FAA*, 610 F.2d 611, 613 (9th Cir. 1979).

In light of these factors, it is hardly surprising that every court to rule on the reasonableness of the FAA's exercise of its administrative discretion in this context has upheld the policy, as well as the individual exemption denials. See, *e.g.*, *Keating* v. *FAA*, 610 F.2d at 613 ("the medical tests proposed by Keating are not sufficiently reliable to compel his employment in a position of great stress and responsibility where sudden incapacitation could jeopardize many lives"); *Rombough* v. *FAA*, 594 F.2d at 899 (the "psychological and physiological changes due to age cannot be tested with sufficient reliability to justify the safety risks involved"); *Gray* v. *FAA*, 594 F.2d 793, 795 (10th Cir. 1979) ("At some point, the state of the medical art may become so compellingly supportive of a capacity to determine functional age equivalents in individual cases that it would be an abuse of discretion not to grant an exemption. It is apparent to us, however, that present medical opinion is far from unanimous on the question."); *Starr* v. *FAA*, 589 F.2d at 314 ("The FAA has the discretionary power to establish a policy that there will be no exemptions granted

until it is satisfied that medical standards can demonstrate an absence of risk factors in an individual sufficient to warrant a more liberal application of the Age 60 Rule.").

3. Petitioners contend that the agency's refusal to issue any exemption to the age sixty rule conflicts with the Act's exemption provision. See Pet. 9-12. However, 49 U.S.C. 1421(c) only empowers the Administrator to grant exemptions. It states that the FAA "may grant" exemptions to its general rules if it "finds that such action would be in the public interest." There is no statutory entitlement to an exemption and no statutory mandate to issue one. See *Starr* v. *FAA*, 589 F.2d at 312 (the statutory language "does not mean that the administrator *must* grant exemptions from the challenged regulation"). Moreover, whether to issue an exception clearly involves an exercise of policy-making and discretion by the agency vested by Congress to ensure the public safety. See 29 U.S.C. 1421(b).

Petitioners cite the Seventh Circuit's *Starr* decision as authority that the agency must issue some exemptions. See Pet. 9. However, that opinion expressly holds that it can be reasonable for the FAA to refuse to grant exemptions to some rules. See *Starr* v. *FAA*, 589 F.2d at 311-312. Further, the court explained the virtue of adopting a no-exemption policy in certain circumstances. *Id.* at 312. Indeed, the *Starr* court held that the issue was whether the FAA's no-exemption policy to the age sixty rule was an abuse of discretion, and the court correctly concluded that it was not. *Id.* at 312-314.

4. Petitioners further assert that the FAA's refusal to grant exemptions is impermissible in light of the medical evidence, studies and anecdotal evidence they have submitted. Pet. 18-22. However, as explained above, the courts have uniformly upheld the FAA's policy of denying exemptions until it determines that medical science can adequately assess the age related risks on an individual pilot basis.

See pp. 6-7, *supra*. In petitioners' initial challenge, the Seventh Circuit similarly upheld the agency's general policy and, more specifically, held that petitioners' medical protocol did not sufficiently eliminate the risks associated with sudden incapacitation and undetected deterioration, and thus did not show the FAA's continued adherence to its policy to be unreasonable. See *Aman* v. *FAA*, 856 F.2d at 953-954. See also Pet. App. 2a.

Petitioners are in reality asking this Court to second guess the agency's evaluation of the medical evidence. That is entirely contrary to the ordinary rules of deference, but is especially inappropriate here, where the issues pertain to scientific, medical and safety related issues, and where the degree of proof required to merit an exemption is itself inherently a policy decision. See *Rombough* v. *FAA*, 594 F.2d at 899-900; *Starr* v. *FAA*, 589 F.2d at 314.

The focus of the remand in this case was to address whether pilot experience offsets the health related risks. The FAA considered the numerous comments and evidence submitted, but was not convinced that experience compensated for the risks associated with sudden incapacitation and undetected deterioration. See Pet. App. 66a. Indeed, the agency found that when the youngest pilots were excluded from the analysis, and experienced "young" pilots were compared with experienced older pilots, the data demonstrated that the older pilots were more prone to accidents. See *id.* at 66a-67a.

In addition, petitioners submitted anecdotal evidence regarding the heroic deeds performed by experienced pilots near or over the age of sixty. See Pet. App. 46a-50a. The FAA properly concluded that several isolated acts do not create a pattern from which any general conclusions or assumptions could be drawn. *Id.* at 47a. The agency agreed that experience can be helpful in emergencies, but concluded that petitioners' anecdotal reports and other evidence simply did not demonstrate that experience offsets the danger of

sudden incapacitation and other decrements which the FAA concluded are greater once a pilot reaches the age of sixty. *Id.* at 47a, 67a.

The court of appeals correctly upheld the FAA's decision that the evidence did not demonstrate the invalidity of the FAA's determination that experience does not offset the health risks associated with age. See Pet. App. 7a-9a. Even the dissenter in the court of appeals recognized that it is highly unlikely that the incremental value of experience could offset the problems associated with "sudden incapacitation." *Id.* at 14a. Accordingly, the decision below was correct and no further review is warranted.

5. Petitioners also contend that the decision below is in conflict with *Airmark Corp.* v. *FAA*, 758 F.2d 685 (D.C. Cir. 1985). Pet. 14-15. *Airmark* simply holds that the FAA must apply consistent criteria in granting or denying petitions for exemptions in like cases. 758 F.2d. at 691-692. However, the FAA is applying consistent criteria to exemptions from the age sixty rule: there will be no exemption unless and until the FAA determines that medical science can assess the individual pilots' risks of sudden incapacitation and other pertinent risks. Petitioners' claim of a conflict is thus incorrect.[4]

With regard to exemptions, petitioners also assert that the agency's willingness to grant special issuances to some airline pilots under the age of sixty with known medical conditions is at odds with the agency's failure to grant exemptions to pilots over the age of sixty, and that this inconsistency conflicts with *Airmark*. Pet. 16-17. This contention is incorrect.

Petitioners' premise that pilots with known medical conditions are indistinguishable from pilots over 60 is un-

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[4] For the same reason, petitioners' reliance on decisions in accord with *Airmark* (see Pet. 14-15 & n.3) is also misplaced.

founded. Pilots can only obtain a special issuance of medical certificate if the agency has determined that a known medical disease or deficiency can be clearly identified and monitored, and then only if the agency has approved adequate means for assessment and surveillance of the condition for any adverse change. Pet. App. 68a. On the other hand, after examining and reexamining the medical evidence available, the Administrator has determined that medical technology does not yet allow reliable predictions regarding the physical consequences of the aging process (including the risk of sudden incapacitation) as to one particular individual pilot. *Id.* at 69a. Thus, there is a clear distinction between these two contexts.

In any event, the Seventh Circuit is the only court that has directly addressed the issue of whether the FAA's denials of petitions for exemptions to the age sixty rule is inconsistent with the grant of exceptions of medical applications. In *Starr* v. *FAA*, the court held that the FAA's granting of exemption to younger pilots suffering from specific medical problems did not make the failure to issue exemption to those over sixty unreasonable. The court explained:

> The rationale for exemptions is to allow an administrator flexibility. Ruling that a liberal exemption policy for one set of circumstances requires such a policy in other circumstances deemed by the agency to be less suitable to safe exemption processes would result in an all-or-nothing policy of exemptions, with the possible effect of denying exemptions in all cases, and limiting the administrator's ability to provide optimum air safety in the public interest.

589 F.2d at 313.

In the case at bar, the Seventh Circuit has again upheld the FAA's distinction (Pet. App. 7a), and petitioners' claim does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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